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In the Supreme Court of the United States

1621

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

---

J. P. TONKOFF,
Counsel for
Petitioner, Barger

Office and Post Office Address:
616 Miller Building
Yakima, Washington 98901

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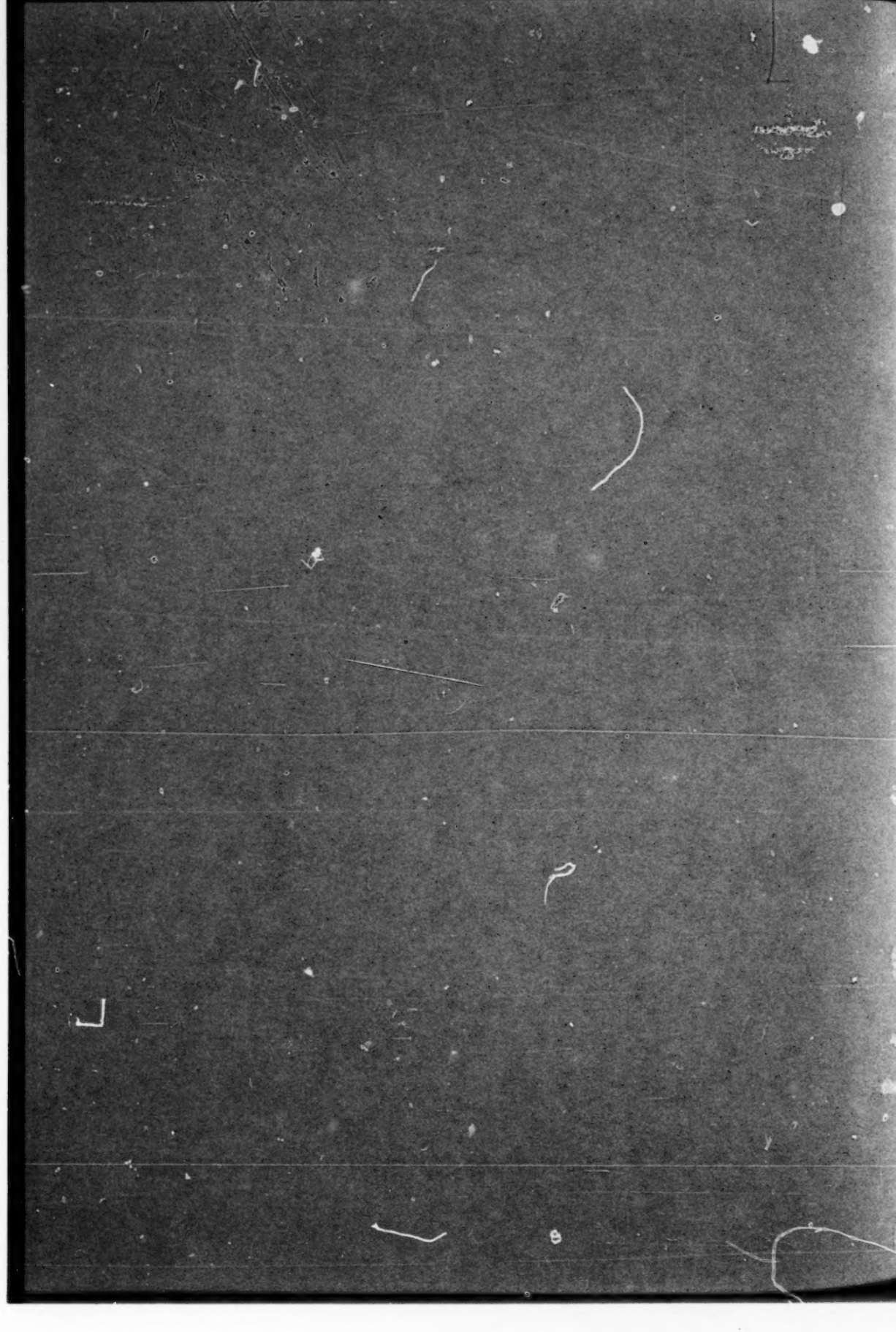

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In the Supreme Court of the United States

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

DONALD BARGER prays for the issuance of a Writ of Certiorari to review the judgments of the Superior Court, Appellate Court and the Supreme Court of the State of Washington denying the dismissal of a criminal information now pending against this petitioner, Donald Barger.

OPINIONS BELOW

Upon this petitioner's presentation for a dismissal of an Information charging the petitioner with the crimes to-wit:

1. Accessory to the commission of a felony;
2. Contributing to the delinquency of a minor (by supplying liquor to said minor), the Superior Court of

Franklin County Washington entered an "Order Denying Motion to Dismiss Information" which Order reads: (Tr. 0005)

"IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, *Plaintiff,* vs. DONALD BARGER, *Defendant.*	NO. 2729 ORDER DENYING MOTION TO DISMISS INFORMATION

THIS MATTER having come on for hearing December 18, 1970, upon defendant's motion to dismiss the information on file herein, defendant not being personally present but represented by J. P. Tonkoff of Tonkoff, Dauber and Shaw, and the State of Washington being represented by C. J. Rabideau, Franklin County Prosecuting Attorney, and the court having read the motion, reviewed the authorities cited, and listened to the arguments of counsel for both parties and having found that the elements of the crime charged in Benton County, to-wit: Sodomy, are unrelated to the two crimes charged in Franklin County, to-wit: (1) Accessory to Commission of a Felony; and (2) Contributing to Delinquency of a Minor (by supplying liquor to said minor) even though the alleged victim of the Benton County crime is the same person as the minor alleged in counts I and II of the Franklin County Information, and the three offenses were unrelated as to time, and the Court's Memorandum Opinion is made a part hereof, NOW THEREFORE,

IT IS HEREBY ORDERED that defendant's motion to dismiss the information on file herein is denied.

DONE BY THE COURT this 8 day of December, 1970.

/s/
JOHN THOMAS DAY, Judge

Presented by:
/s/ C. J. Rabideau
C. J. Rabideau
Prosecuting Attorney"

From which Order a Writ of Certiorari was sought in the Court of Appeals of the State of Washington, Division III. Pursuant to an argument in said court, without a written opinion, an order was issued dated January 22, 1971, to-wit: (Tr. 0006)

"IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,	No. 341-III Division Three
v.	ORDER DENYING
DONALD BARGER, *Petitioner*.	PETITION FOR WRIT OF CERTIORARI

This matter having come before the court on an order to show cause why petitioner's petition for writ of certiorari should not be issued, counsel for both parties being present, the court having considered oral arguments of counsel, memorandum briefs of both parties, the trial court's order and memorandum opinion, and being fully advised in the premises; Now, therefore, it is

ORDERED that petitioner's petition for writ of certiorari be and the same is hereby denied.

DATED at Spokane, Washington, this 22 day of January, 1971.

By the Court:

/s/
Ray E. Munson
Chief Judge"

From which Order, as a last resort, a Petition for Writ of Certiorari was sought in the Supreme Court of the State of Washington, to-wit: (Tr. 0001-0004)

"IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,*	NO. 41853
vs.	PETITION FOR WRIT OF CERTIORARI
DONALD BARGER, *Petitioner.*	

PETITIONER SHOWS UNTO THE COURT AS FOLLOWS:

1.

That your petitioner by criminal complaint filed in Benton County in August of 1970, was charged with the crime of sodomy. That your petitioner went to trial on November 4, 1970 in Benton County, Washington and a verdict was returned by the jury of Not Guilty and judgment of dismissal was entered in said matter.

2.

A warrant for the arrest of the petitioner was issued on the 4th day of September, 1970 in Franklin County and on said date an Information was filed charging your petitioner with the crime of Accessory to Commit a Felony by assisting a minor to avoid or escape trial, conviction and punishment in one count and the second count of Contributing to the Delinquency of a minor by supplying liquor to said minor.

3.

That the minor referred to in said Information is the complaining witness in the sodomy case filed in Benton County. That said minor referred to in the Franklin County case is the same minor that testified in the Benton County case and is the same minor referred to in Count I and II in the Franklin County proceeding.

4.

That heretofore your petitioner filed a Motion to Dismiss the Information in Franklin County on the ground and for the reason that he would be subjected to double jeopardy in violation of his constitutional rights for the reason and on the grounds

that in the trial held in Benton County the court received evidence relating to the association and course of conduct between your petitioner and complaining witness which extended over a period from May 30th until the end of August, 1970, which evidence included the acts which constituted the charge in the criminal complaint brought against your petitioner in Franklin County.

5.

That your petitioner's motion to dismiss was heard by the Superior Court of Franklin County and on the 8th day of January, 1971, the court entered an Order denying your petitioner's Motion to Dismiss the Information filed in said court which Order is hereby attached and marked Ex. "A".

That your petitioner requested an issuance of a Writ of Certiorari out of the Court of Appeals for the State of Washington, Division III, and the same matter was given Cause No. 341-III, and by Order dated January 22, 1971, the Court of Appeals denied the petition for Writ of Certiorari, a copy of which Order is attached hereto and marked Ex. "B".

That this petition is based on the proceeding which took place and which were reported by a Court Reporter and filed in this court in support of this Petition.

6.

That the trial court and the Court of Appeals committed grave and irreparable error and violation of your petitioner's constitutional rights by overruling your petitioner's Motion to Dismiss and Petition for Writ of Certiorari and your petitioner seeks to have the trial court's ruling reversed and petitioner's motion granted

WHEREFORE, your petitioner prays for an order reversing the trial court's ruling and dismissing the Information in Franklin County.

/s/ J. P. Tonkoff
J. P. TONKOFF
of TONKOFF, DAUBER & SHAW
Attorneys for Petitioner"

The Supreme Court of the state of Washington refused to take jurisdiction and entered the following Order: (Tr. 0038)

"February 22, 1971

Tonkoff, Dauber & Shaw
Attorneys at Law
Mr. J. P. Tonkoff
616 Miller Bldg.
Yakima, Washington 98901

Honorable Clarence J. Rabideau
Prosecuting Attorney
Franklin County Courthouse
Pasco, Washington 99301

Gentlemen:

Re: 41853 — State of Washington v. Donald Barger

Following the hearing on February 19, 1971, on the Petition for Writ of Certiorari in the above case, the following notation order was entered on page 222, Vol. 13, of the motion docket:

'Denied

/s/ Orris L. Hamilton,
Chief Justice'

Since the Supreme Court did not take jurisdiction, the cause will not be remitted.

Very truly yours,
William M. Lowry,
Clerk

WML:am

cc: Honorable Thomas Day, Judge
Franklin County Superior Court"

The final Order which can be entered in the jurisdiction of the state of Washington denying the Writ of Certiorari is dated February 22, 1971.

JURISDICTION

The jurisdiction of this court is invoked by virtue of 28 U.S.C. Section 1257:

> "§ 1257. **State courts; appeal; certiorari**
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTIONS PRESENTED FOR REVIEW

1. Is the Petitioner who has been acquitted of a charge of sodomy in the Benton County Superior Court subject to further prosecution in Franklin County which adjoins Benton County upon a charge of a different felony and misdemeanor based upon the same evidence that was introduced in the prosecution of the sodomy charge in Benton County, Washington?

2. Is the Superior Court in Benton County and the

Superior Court in Franklin County separate political subdivisions or separate sovereign entities in the state of Washington?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five of the United States Federal Constitution:

> "RIGHTS OF PERSONS CHARGED WITH CRIME — No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

AND Amendment Fourteen of the United States Federal Constitution:

> "CITIZENSHIP — EQUALITY OF RIGHTS — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property; without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Eugene C. Priest, a minor was the complaining witness in an Information filed on the 13th day of August, 1970, charging Donald Barger, this petitioner, with the crime of sodomy in Benton County, Washington.

While the charge was pending, on the 4th day of September, 1970, Donald Barger, the petitioner, was charged in Franklin County, Washington, with the crime of harboring and concealing a minor who had committed a felony by unlawfully taking an automobile without the permission of the owner, with the intent that the minor avoid and escape arrest, trial, conviction or punishment.

The car taken belonged to Donald Barger, the petitioner.

In the second count, the petitioner was charged with contributing to the delinquency of a minor.

On the 4th day of November, 1970, Donald Barger, the petitioner, went to trial on the sodomy charge in Benton County and was acquitted by a jury and a judgment of dismissal entered in that cause.

No additional testimony will be introduced that was not introduced in the prosecution of the sodomy charge in support of the prosecution of the felony and the misdemeanor referred to in this petition.

The petitioner brought on a motion to dismiss the criminal charges brought in Franklin County, Washington upon the grounds that if tried he would be sub-

jected to double jeopardy in violation of his constitutional rights and further that he has an absolute legal defense of collateral estoppel for the reason that it is conceded or stipulated that the evidence to be introduced in the prosecution of the charges contained in the Franklin County, Washington case would be the same as the evidence introduced in the Benton County, Washington case. (Tr. 0008, 0009, 0012).

The trial court who presided over the trial in Benton County with respect to the sodomy charge was the same trial court who heard the petitioner's motion to dismiss the information filed in Franklin County charging the petitioner with a felony and a misdemeanor so the court was fully aware of the evidence that was to be presented in the second prosecution. The trial court in Franklin County announced that he considered that no additional evidence would be introduced in the prosecution of the Franklin County charge when he denied petitioner's motion to dismiss.

REASONS FOR GRANTING WRIT

The Supreme Court of the United States has squarely passed upon the questions presented for review in this petition for Writ of Certiorari in the case of *Waller v. Florida*, 25 L. Ed. 2d., 435; *State v. Hite*, 3 Wn. App. 9, 472 P.2d., 600 and *Ashe v. Swenson*, 25 L. Ed. 2d., 469.

The appellate courts in the state of Washington have declined to adopt the ruling of the United States Supreme Court set forth in the above cited cases. If the

petitioner is required to proceed to trial, his constitutional immunity would be violated and he would be denied the defense of collateral estoppel.

CONCLUSION

The questions presented by this petition are substantial and of public interest and importance. Denial of the petitioner's petition for Writ of Certiorari in this court would require the petitioner, Donald Barger, to be twice put in jeopardy contrary to his constitutional rights and stripped of his absolute legal defense of collateral estoppel.

Respectfully submitted,
J. P. TONKOFF,
Counsel for
Petitioner, Barger

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

C. J. Rabideau,
Franklin County Prosecuting Attorney,
Counsel for Respondent,
State of Washington

In the Supreme Court of the United States

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printGraphics, Inc. Pasco, Wash

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In the Supreme Court of the United States

DONALD BARGER, *Petitioner*

vs.

STATE OF WASHINGTON, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The State of Washington prays that the Court deny the Petition for Writ of Certiorari to reveiw the orders of the Superior Court, Appellate Court, and the Supreme Court of the State of Washington denying the dismissal of a criminal Information, Franklin County Criminal No. 2729, now pending against petitioner Donald Barger.

STATEMENT OF FACTS

Franklin County, State of Washington, is separated from Benton County, State of Washington, by the Columbia River. Crossing the Columbia River along this boundary requires more than wading or fording; the river being approximately one-quarter to one-half

mile wide for a distance of some forty miles. Each county has its own elected Prosecuting Attorney. In the State of Washington a Prosecuting Attorney has jurisdiction only within the boundaries of the county wherein he is elected. Revised Code of Washington (hereinafter referred to as R.C.W.) 36.27.010 states as follows:

> "Eligibility to office. No person shall be eligible to the office of prosecuting attorney in any county of this state, unless he is a qualified elector therein, and has been admitted as an attorney and counselor of the Courts of this state."

Prior to July 30, 1970, petitioner Donald Barger resided in the City of Richland, County of Benton, some ten miles distant by road and highway bridge from the City of Pasco, County of Franklin. Petitioner was then, and is now, a caseworker for the Washington State Department of Public Assistance, social-working out of the Pasco office. In years past, petitioner became acquainted with a minor, to-wit: Eugene C. Priest whose birthday is alleged to be July 19, 1953. In fact petitioner was said minor's case worker in the City of Port Angeles, County of Clallam, on Puget Sound some 300 miles from Pasco prior to moving to this area about two years ago. Somehow Eugene C. Priest discovered that petitioner lived in Richland. In the early summer of 1970, petitioner made living accommodations available to Eugene C. Priest, then age 17, at petitioner's Richland residence. Both resided together at the Richland residence until sometime

in late July 1970 when petitioner and said minor moved to the City of Pasco and took up joint residence again. In mid August, 1970, petitioner was arrested and charged by the Benton County Prosecuting Attorney with the crime of Sodomy, alleging that the criminal act occurred July 17, 1970 in Benton County, State of Washington. Sodomy is defined in the Revised Code of Washington as follows:

> "9.79.100 Sodomy-Penalties. Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:
>
> "(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.
>
> "(a) In all other cases by imprisonment in the state penitentiary for not more than ten years."

A jury trial ensued and petitioner was acquitted. That trial took place November 4, 1970. The issue in that trial was whether or not petitioner had committed an act of oral Sodomy upon the minor aforementioned.

Earlier, to-wit: September 4, 1970, three weeks after the Benton County Prosecuting Attorney charged petitioner with the crime of sodomy, the Franklin County Prosecuting Attorney charged petitioner, by

Information, with two crimes:

> "The the said Donald Barger in the County of Franklin, State of Washington, on or about the period from the 30th day of July to the 12th day of August, 1970, then a d there wilfully, unlawfully and feloniously
>
> COUNT I
>
> did harbor, conceal or aid a minor, who had committed a felony; to-wit: the crime under RCW 9.54.020 of unlawful taking of an automobile without the permission of the owner, with the intent that said minor may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that said minor has committed a felony as aforesaid, or is liable to arrest.
>
> COUNT II
>
> did contribute to the delinquency of a minor by supplying liquor to the minor mentioned in Count I . . ."

The criminal code provisions pertinent to Count I are as follows

> "RCW 9.01.040 Accessory defined. Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender with intent that he may avoid or escape from arrest, trial convicition or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony."
>
> "RCW 9.54.020 Taking Motor Vehicle without permission. Every person who shall without the

permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony."

The Washington code provision germane to Count II is as follows:

"R.C.W. 13.04.170 Contributing to delinquency—Penalty—Bond. In all cases where any child is dependent or delinquent under the terms of this title, the parent or parents, legal guardian, or person having custody of such child, or any other person, who, by any act or omission, encourages, causes or contributes to the dependency of delinquency of such child shall be guilty of a misdemeanor, and upon convicition thereof, be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine or imprisonment, . . ."

"R.C.W. 13.04.010 Juvenile court law-Dependent and delinquent children defined-Wards of state . . . "The words 'delinquent child' mean any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, or county of this state defining a crime or who has violated any federal law or law of another state defining a crime, and whose case has been referred to the juvenile court by any jurisdiction whatsoever."

Respondent understands that the testimony in the

Benton County Sodomy trial included reference to the fact petitioner furnished liquor to Eugene C. Priest in Franklin County. However, such reference did not relate to an element of the crime of sodomy, or to the time the sodomy act was alleged.

ARGUMENT

The acts alleged in Benton County took place on or about July 17, 1970. The acts alleged in Franklin County, contained in Counts I and II of the Franklin County Information occurred between July 30 and August 12 1970. A time gap of two weeks exists between the Benton County charge and the Franklin County charges.

The Prosecuting Attorney is guided by the following venue statutes:

> "RCW 10.25.010 Criminal actions—Where commenced. Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed."

> "RCW 10.25.020 Offenses committed in two or more counties. When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

> "RCW 10.25.030 Offenses committed on county boundaries. Offenses committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in

the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county."

"R.C.W. 10.25.060 Accessory after the fact. An accessory after the fact to a felony may be tried either in the county in which he shall have become an accessory, or in the county in which the felony shall have been committed."

Petitioner has not suggested that either of the crimes alleged in the Franklin County Information took place in Benton County, or that the Benton County Prosecuting Attorney had jurisdiction to charge in Benton County for crimes which occurred in Franklin County. This is not a county line situation as provided for in RCW 10.25.020 and RCW 10.25.030, *supra.* It was incumbent upon the Franklin County Prosecuting Attorney to press charges in Franklin County since the facts alleged in the Information, in cause No. 2729, relate to the elements of crimes which happened only in Franklin County. The venue statutes above cited require this result. Since the Benton County Prosecuting Attorney is not an elector in Franklin County, he has no jurisdiction to act in Franklin County. R.C.W. 36.27.010, *supra.*

Waller vs. Florida, 397 U.S. 387, 25 L.ed 2d 435, 90 S CT 1184, relates to a set of contemporaneous circumstances wherein *Waller* was charged in both the municipal court and the state court in the same county. This court was of the opinion that it would be double jeopardy in the event the elements of the county ordinance

violations were or could have been factually elements of the State Criminal Code violations subsequently charged. The cause was remanded to make this determination. This court decided that *Waller* should have been tried once for all charges arising out of the same factual situation in the same jurisdiction. The court further determined that the county and city involved were within the same jurisdicition. On our facts, we have a different situation: Two separate counties, which are different jurisdictions under the aforementioned venue statutes.

Petitioner argues the efficacy of *Ashe vs. Swenson,* 397 U.S. 436, 25 L.ed 2d 469, 90 S CT 1189. That case is not apposite. No one suggests that petitioner is being tried again for the same act. In Benton County he was charged with Sodomy on July 17, 1970. He is not now and has never been charged with Sodomy in Franklin County at any time. To this date, no offer of proof has been made by petitioner that the elements of Counts I and II herein are necessarily or remotely connected with the Sodomy charge in Benton County. No authority has been cited by petitioner which would bar respondent from proceeding against him in Franklin County for the sole reason that certain testimony adduced in the Benton County trial related to facts which subsequently occurred in Franklin County.

Petitioner misapplies the rule of *Ashe vs. Swenson, supra.* The collateral estoppel argument fails for the reason that the only ultimate fact litigated in Benton

County related to whether or not Donald Barger, petitioner herein, committed the act of Sodomy as charged. Whether or not Donald Barger furnished alcohol to the minor child involved was not an ultimate fact to be proven in the Benton County cause. In *State vs. Hite,* 3 Wash. App. 9, it was held that in order to support a plea of double jeopardy, a defendant must show jurisdiction in the court in the earlier trial, and that the two trials would involve defenses identical in law and in fact. The case held further that collateral estoppel is applicable in criminal cases to prevent the State from proving a criminal charge by asserting facts necessarily determined against it in an earlier unsuccessful trial of the same defendant on different charge. Respondent does not question the result in the *Hite* case *supra,* the facts therein are related to incidents occurring on the same date or dates and times. Petitioner has failed to show that the two trials would involve offenses identical in law and fact. In addition, petitioner has failed to prove that the ultimate facts required in the Franklin County case were determined against respondent in the earlier unsuccessful Benton County trial.

The decisions of the trial court, Appellate Court, and Supreme Court of the State of Washington, are correct along settled principles. They are consistent with *Ashe vs. Swenson, supra,* and *Waller vs. Florida, supra.*

CONCLUSION

Respondent has conclusively established that petitioner will not be tried for crimes in Franklin County which are based on ultimate facts found against the State of Washington in the Benton County trial. Petitioner has not been charged heretofore with the crimes contained in Counts I and II of the Franklin County Information upon the dates and times alleged. It is quite clear that the doctrines of double jeopardy and colleteral estoppel do not apply.

Respondent has established that the Franklin County Prosecuting Attorney was not vested with jurisdiction to charge petitioner with the crime of Sodomy, which allegedly occurred July 17, 1970, for the reason that it happened in another county. And by the same token, the Benton County Prosecuting Attorney was without jurisdiction to charge petitioner with those crimes alleged in Franklin County between July 30 and August 12, 1970. The Court should deny the petition for Write of Certiorari.

Respectfully submitted,

C. J. Rabideau, Franklin
County Prosecuting Attorney,
Counsel for Respondent,
State of Washington